IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01857

LORA LOPEZ — APPELLANT

VERSUS

ROBERT D. MCCLELLAN — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CAUSE NO. A2402-2005-31

APPELLANT'S BRIEF

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lora Lopez, Appellant
2. Russell S. Gill and RUSSELL S. GILL, P.L.L.C., Attorney for Appellant
3. Shannon Ladner and RUSSELL S. GILL, P.L.L.C., Attorney for Appellant
4. Robert D. McClellan, Appellee
5. Donald C. Dornan, Jr., and SPYRIDON, PALERMO & DORNAN, LLC
6. Kelly Pendergrass Dees and SPYRIDON, PALERMO & DORNAN, LLC

Respectfully submitted, this the 18th day of June, 2009.

LORA LOPEZ, APPELLANT

BY: Shannon Ladner

RUSSELL S. GILL, MSB No. 4840
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STATEMENT OF THE ISSUES

Appellant Lora Lopez presents the following issues for the Honorable Court's consideration:

1. Whether the trial court erred in granting a *sua sponte* Motion for Summary Judgment, thereby dismissing that action with prejudice.

2. Whether the trial court erred in excluding expert medical testimony of Dr. Charles Winters as to any causal relationship of Lora Lopez's injuries to the impact with Robert D. McClellan's vehicle.

3. Whether the trial court erred in finding that no genuine issue of material fact existed on the issue of causation of Lora Lopez's injuries.

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

This appeal to the Supreme Court of Mississippi stems from an order and judgment entered by the Honorable Jerry O. Terry, Circuit Court Judge for the Second Circuit Court District, on October 16, 2008, whereby summary judgment was granted to the Defendant, Robert D. McClellan ("McClellan"), and final judgment entered in favor of McClellan pursuant to Mississippi Rule of Civil Procedure 56. (R. at 77-79, 81-82)[1]; (R.E. at 76-78, 80-81)[2]. This matter was set for a jury trial on September 16, 2008, whereupon counsel appeared before the Judge Terry and argued outstanding pre-trial motions in anticipation of trial. (Tr. at 1-34)[3]; (R.E. at 98-133). The Court heard arguments of counsel regarding McClellan's Motion to Strike No. 1 – Opinions of Dr. Charles Winters, which is relevant to the instant appeal. (Tr. at 2-16; R. at 31-76); (R.E. at 101-115, 30-75). After taking the motion and arguments of counsel under advisement, Judge Terry stated his decision on September 17, 2008, and ruled *sua sponte* in favor of McClellan for what the Court deemed "summary judgment." (Tr. at 19-31); (R.E. at 118-130). Subsequent to the Court's entry of its final judgment, Appellant Lora Lopez ("Lopez") timely filed her Notice of Appeal on November 10, 2008. (R. at 84-86); (R.E. at 83-85).

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[1] "R." is the abbreviation used by Appellant Lora Lopez to cite to the page number of the Record prepared by the Circuit Court of Harrison County, Mississippi, Second Judicial District.

[2] "R.E." is the abbreviation used by Appellant Lora Lopez to cite to Appellant's Record Excerpts, which are submitted herewith pursuant to M.R.A.P. 30.

[3] "Tr." is the abbreviation used by Appellant Lora Lopez to cite to the page number of the Transcript Excerpts of proceedings on September 16, 2008, and September 17, 2008.

II. Statement of the Facts

On Friday, February 13, 2004, Appellant Lora Lopez ("Lopez") was a front seat passenger in a 2000 GMC Sonoma automobile traveling westbound on Highway 67, Biloxi, Mississippi. (R. at 17); (R.E. at 16). The driver of the vehicle was Lopez's friend, Jaclyn S. Hughes ("Hughes"). (*Id.*). Meanwhile, Linda G. Nesline ("Nesline") was traveling eastbound on Highway 67 in a 1996 Grand Cherokee, whereupon she crossed over into the oncoming westbound lane of traffic in which Lopez and Hughes were traveling. (*Id.*). At that time, the front of Nesline's vehicle collided with the front of the vehicle in which Lopez was riding, which resulted in a head-on collision. (*Id.*). Appellee Robert McClellan ("McClellan") was traveling westbound on Highway 67 in a 1993 Nissan, and was following immediately behind the vehicle in which Lopez was a passenger. (*Id.*). Upon the impact between Nesline and the vehicle driven by Hughes, the front of McClellan's vehicle collided with the rear of Hughes and Lopez. (*Id.*).

As a result of the aforesaid collision with Nesline and McClellan, Lopez sustained severe injuries and was immediately taken by ambulance to Biloxi Regional Medical Center. (P-3, Ambu-003)[4]; (R.E. at 134). Due to the nature of her injuries as a result of the collision with Nesline and McClellan, Lopez received medical treatment from numerous physicians, including Dr. Charles Winters, who performed back surgery on Lopez on December 14, 2004. (P-3, OSH-063); (R.E. at 135).

Lopez filed a lawsuit in the Circuit Court of Harrison County, Mississippi, Second Judicial District, Cause No. A2402-2005-31, on February 23, 2005, and named Nesline and

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[4] "P-" is the abbreviation used by Appellant Lora Lopez to cite to the Plaintiff's trial exhibits (P-1 through P-14), which were marked and received into evidence by the trial court. (Tr. at 33); (R.E. at 132).

McClellan as defendants therein.[5] (R. at 16-21); (R.E. at 15-20). Count II of her Complaint alleged negligence on the part of McClellan for breaching his duty to operate his vehicle with due and reasonable care, so as to allow it to collide with the rear of the vehicle in which Lopez was a passenger. (R. at 4); (R.E. at 3). Pursuant to the Mississippi Rules of Civil Procedure, Lopez timely filed her Designation of Experts on July 16, 2008, and named as one of her experts Dr. Charles Winters. (R. at 7, 43); (R.E. at 6, 42). Lopez also named Dr. Winters as a potential expert on May 26, 2005, in her answers to interrogatories propounded by McClellan, and anticipated that Dr. Winters would testify as to Lopez's "orthopedic injuries, diagnoses, and treatment, as well as causation and prognosis." (R. at 70-71); (R.E. at 69-70). Dr. Winters prepared a letter dated May 12, 2006, wherein he states his medical opinion as to Lopez's injuries, assigns her 9% impairment to the whole body and apportions 50% of Lopez's injuries to each impact between the automobile in which she was riding and the automobiles driven by Nesline and McClellan. (R. at 75); (R.E. at 74).

Additionally, the deposition of Dr. Winters was held on July 15, 2008, whereupon he testified regarding his treatment of Lopez and the causal connection between Lopez's need for surgery and the two impacts between the vehicle in which she was riding and that of Nesline and McClellan. (P-6, 1-46); (R.E. at 136-181). As indicated in his letter of May 12, 2006, Dr. Winters testified in his deposition that the rear collision with McClellan contributed to 50% of Lopez's need for surgery. (P-6, 19); R.E. at 154). Dr. Winters testified to a reasonable medical probability regarding his apportionment of damages, and

[5] Defendant Linda Nesline was dismissed from this cause on April 27, 2006, pursuant to an agreed settlement of claims between Nesline and Lopez. (R. at 10); (R.E. at 9). Thereafter, on June 19, 2006, Judge Terry entered an Agreed Order consolidating Jaclyn Hughes' lawsuit, which originated in the County Court of Harrison County, Mississippi, Second Judicial District, D2402-05-619, with the instant matter. (R. at 29-30); (R.E. at 28-29).

further agreed that this opinion is based on training and experience in the field of orthopedic surgery since 1988.

McClellan thereafter filed Motion to Strike No. 1 – Opinions of Dr. Charles Winters on August 22, 2008, which moves to strike Dr. Winters as an expert based on his opinions regarding apportioned causation. (R. at 31-42); (R.E. at 30-41). Counsel argued said Motion to Strike on September 16, 2008, immediately prior to the scheduled jury trial, and Judge Terry stated his decision to grant McClellan's motion on September 17, 2008. (R. at 19-20); (R.E. at 18-19). Following Judge Terry's ruling, counsel for McClellan stated the following, in pertinent part:

> I'm really not sure what the procedural device is at this point. But I think simply the defendant at this time moves to dismiss, or for an involuntary dismissal, or for a directed verdict or summary judgment, whatever the proper procedural device is at this point on the grounds that in the absence of those medical opinions which are required in order to establish any causal relationship between the second impact with the defendant and any injuries and damages claimed, those cases must fail, those claims must fail...There is no jury-submissible issue, there is no genuine issue of material fact based on the record now as made and as ruled on by the Court that would create any jury issue on causation of injuries. And so we would move to dismiss the plaintiff's case at this point on that basis.

(R. at 29); (R.E. at 28).

Judge Terry granted McClellan's request and responded, in part, "I'll call it summary judgment, all right?" (R. at 31); (R.E. at 30).

SUMMARY OF THE ARGUMENT

The trial court erred in granting a *sua sponte* Motion for Summary Judgment, thereby dismissing that action with prejudice, in excluding expert medical testimony of Dr. Charles Winters as to any causal relationship of Lora Lopez's injuries to the impact with Robert D. McClellan's vehicle and in finding that no genuine issue of material fact existed on the issue of causation of Lora Lopez's injuries.

McClellan improperly moved *ore tenus* for the dismissal of Lopez's case, and stated, "the defendant at this time moves to dismiss, or for an involuntary dismissal, or for a directed verdict or summary judgment, whatever the proper procedural device is at this point." Said motion was inappropriate, in that Lopez did not receive ten days notice thereof, and the granting of a motion for summary judgment, therefore, **MUST** be reversed.

Furthermore, the trial court erred in striking the expert testimony of Dr. Winters. Lopez submits that the opinions set forth by Dr. Winters are generally accepted within the field of orthopedic surgery.

ARGUMENT

I. The Circuit Court erred in granting a *sua sponte* Motion for Summary Judgment, thereby dismissing that action with prejudice.

In *Cowan v. Miss. Bureau of Narcotics*, the Mississippi Court of Appeals stated the following regarding standard of review: "This Court employs a de novo standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *Cowan v. Miss. Bureau of Narcotics*, 2 So.3d 759, 763 (Miss.Ct.App. 2009) (quoting *McMillan v. Rodriguez*, 823 So.2d 1173, 1176-77 (Miss. 2002)). The Mississippi Supreme Court has also held that it "reviews orders granting summary judgment *de novo*, without deference to the trial court." *Palmer v. Biloxi Regional Medical Center, Inc.*, 649 So.2d 179, 181 (Miss. 1994) (citing *W.B. Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss. 1994); *Davis v. Davis*, 558 So.2d 814 (Miss. 1990); *Huff v. Hobgood*, 549 So.2d 951 (Miss. 1989); *Short v. Columbus Rubber and Gasket Co.*, 535 So.2d 61 (Miss. 1988); *Pearl River County Board of Supervisors v. Southeast Collections Agency, Inc.*, 459 So.2d 783 (Miss. 1984)).

As stated hereinabove, counsel for McClellan moved *ore tenus* for the dismissal of Lopez's case, and stated, "the defendant at this time moves to dismiss, or for an involuntary dismissal, or for a directed verdict or summary judgment, whatever the proper procedural device is at this point." (R. at 29); (R.E. at 28). At the time of the trial hereon, McClellan had not filed a motion for summary judgment, but had only filed a Motion to Strike. (R. at 2-13); (R.E. at 1-12). Mississippi Rule of Civil Procedure 56(c) sets forth the procedure for summary judgment motions, and states the following: "The motion shall be served **at least ten days before the time fixed for the hearing**." MISS. R. CIV. P. 56(c) (emphasis added).

It is clear from a review of the record that McClellan failed to timely file his motion for summary judgment in accordance with Rule 56(c) of the Mississippi Rules of Civil Procedure.

In response to McClellan's untimely, untitled *ore tenus* motion, the Court made the following ruling:

> Well, in some instances there's always an issue as to whether a motion should be granted or whether a motion should be denied, and so it's either granted or denied, and also whether it should be dismissed as a directed verdict or whether it should be on a summary judgment, both being somewhat of the same effect. And at this stage with these proceedings, I would think that the motion for the granting of a directed verdict is not the term that should be used, but more so that the matter is dismissed based upon summary judgment based upon my ruling on the medical itself, and the medical only. That there's no genuine issue of fact to be submitted to the jury on the causation as to the results of impact number one and the results of impact number two. So I'll call it summary judgment, all right?

(Tr. at 30-31); (R.E. at 129-130).

Mississippi courts are clear in requiring compliance with MISS. R. CIV. P. 56(c). The Court in *Pope v. Schroeder*, 512 So.2d 905 (Miss. 1987) reversed the decision of the trial court in granting summary judgment upon an *ore tenus* motion of one of the defendants. The Supreme Court found merit in the Popes' argument that said motion was inappropriate, in that they did not receive ten days notice. In reversing the trial judge's grant of summary judgment, the Court stated:

> We shall not delve too deeply into the record to determine whether the Popes were prejudiced. Summary judgment is not to be a substitute for a trial of disputed fact issues. (citations omitted) In keeping with these decisions, we think summary judgment should not be used to snuff out a litigant's right to a trial unless it is appropriate under the rule. The requirements of Rule 56(c), far from being a mere extension of our liberal procedure exhalting [sic] substance over form, represents a procedural safeguard to prevent the unjust deprivation of a litigant's constitutional right to a jury trial. Miss. Const., art. 3, § 31 (1890). Thus, we cannot stress too strongly that a trial court should require compliance with Rule 56(c) before

> entertaining a motion for summary judgment. The failure to do so here was error which requires reversal.

Pope, 512 So.2d at 908.

Furthermore, the Mississippi Supreme Court has held that if a trial judge *sua sponte* converts a motion to dismiss to one for summary judgment without giving ten days notice, the trial judge's grant of summary judgment must be reversed. *Palmer*, 649 So.2d at 182. The *Palmer* Court continues looked to the Eleventh Circuit for the strict notice requirements creating a bright-line rule: "If a trial court fails to comply with the ten-day notice requirement, the case will be reversed and remanded so that the trial court may provide the non-moving party with adequate notice." *Id.* at 183 (citing *Jones v. Automobile Ins. Co. of Hartford, Conn*, 917 F.2d 1528, 1532 (11th Cir. 1990)). In its analysis, the Mississippi Supreme Court went on to hold that our constitution and case law is consistent with the Eleventh Circuit's strict enforcement of the notice requirements. *Id.* The Court further reasoned that the reason for the strict compliance with MISS. R. CIV. P. 56(c) is due to the fact that granting summary judgment results in the "final adjudication of the merits of a case." *Id.* at 184 (citing *Donald v. Reeves Transport Co.*, 538 So.2d 1191, 1196 (Miss. 1989); *Jones*, 917 F.2d at 1533).

In light of the foregoing authority, it is clear that the grant of summary judgment in the instant matter was reversible error. As such, the decision of the trial court must be reversed, and the case remanded back to the trial court.

II. The trial court erred in excluding expert medical testimony of Dr. Charles Winters as to any causal relationship of Lora Lopez's injuries to the impact with Robert D. McClellan's vehicle.

The Motion to Strike Dr. Charles Winters filed by McClellan relies, in part, on *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2004), wherein the Mississippi Supreme Court modified the *Daubert* standard for the admissibility of expert testimony. However, subsequent to *McLemore*, the Mississippi Supreme Court released *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004), in which it held the following:

> This Court has continually insisted that it must be "scientifically established that due investigation and study in conformity with techniques and practices **generally accepted** within the field will produce a valid opinion" before an opinion based on "those techniques and practices" will be considered for admission in a Mississippi Court.

Pharmaceutica, 878 So.2d at 60 (quoting *T.K. Stanley, Inc. v. Cason*, 614 So.2d 942, 951 (Miss. 1992)). Lopez submits that the opinions set forth by Dr. Winters are generally accepted within the field of orthopedic surgery. Dr. Winters stated the following in his deposition testimony:

> BY MR. GILL:
>
> Q. In your letter to me of May 12th, you stated: With regard to the two collisions, it is impossible for me to state which of those two is the direct cause.
>
> And that's your opinion; is that right, Doctor?
>
> A. Yes.
>
> Q. The direct cause. I would have to approximate or portion – or apportion fifty percent to each accident.
>
> That's still your opinion; is that correct?
>
> A. Yes.
>
> Q. And that – although as Ms. Dees points out, there may not be a scientific treatise to support that. How many years have you been a doctor?

A. Since 1983.

Q. 1983?

A. Yeah.

Q. And you've been around orthopedic injuries for –

A. Since 1988.

Q. 1988. So is it fair to say that your opinion that fifty percent should be apportioned to the rear-end collision – is that based on your training and experience as a professional orthopedic surgeon?

A. Yes.

Q. Is that, again, your opinion to a reasonable medical probability?

A. I think – yes. I think that's reasonable.

(P-6, 43-44); (R.E. at 178-179).

Furthermore, in *Hughes v. Great American Indemnity Company*, 236 F.2d 71 (5th Cir. 1956), which has neither been distinguished nor overruled, the Fifth Circuit considered facts analogous to the case at bar. In *Hughes*, the plaintiff was struck head-on by an oncoming vehicle, and then immediately rear-ended by the following vehicle. *Hughes*, 236 F.2d at 72. The Court stated the following regarding damages:

> Damages do not have to be established with mathematical certainty so long as there is evidence that damages did probably ensue from the second collision and so long as a reasonable basis is established for recovery of those damages. What the Supreme Court recently said in discussing the allied subject of negligence points to the rule which should be followed in such a situation: "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. But measuring negligence is different. * * * Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. "We think these are questions for the jury to determine. * * * * * * Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs,

> grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Id. at 75 (quoting *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 525-526, 76 S.Ct. 608, 610 (1956)).

It is clear from the foregoing that the trial court erroneously struck Dr. Winters' testimony.

III. The trial court erred in finding that no genuine issue of material fact existed on the issue of causation of Lora Lopez's injuries.

In support of the decision to strike the expert medical testimony of Dr. Charles Winters, Judge Terry relied primarily on the Mississippi Supreme Court's decision in *Blizzard v. Fitzsimmons*, 193 Miss. 484, 10 So.2d 343 (Miss. 1942). (Tr. at 21); (R.E. at 120). The Court stated that *Blizzard* had not been contradicted; however, a review of the case reveals that it was, in fact, distinguished by *Hinds-Rankin Metropolitan Water & Sewer Ass'n v. Reid*, 256 So.2d 373 (Miss. 1971).

In *Blizzard*, the plaintiff was a nine-year-old boy who went roller-skating at a public skating rink owned by the Defendant. *Blizzard*, 10 So.2d at 344. Upon his first attempt to skate, he immediately fell and continued to fall with each attempt, which totaled approximately forty to fifty times. *Id.* The defendant became aware of plaintiff's falls when he began to cry. *Id.* As a result of the repetitive falling, plaintiff ultimately had surgery and has permanent injuries. *Id.* The Court's analysis focuses on two series of falls regarding the same defendant, one for which the defendant is liable, and one for which the defendant is not liable. *Id.*

Blizzard is not applicable to the case at bar, in that *Blizzard* held that there can be no recovery when there is no identification of "which of several possible causes produced the

injury where some of the causes do not involve the negligence of the party charged." *Hinds-Rankin*, 256 So.2d at 379.

CONCLUSION

The trial court erred in granting a *sua sponte* Motion for Summary Judgment, thereby dismissing that action with prejudice, in excluding expert medical testimony of Dr. Charles Winters as to any causal relationship of Lora Lopez's injuries to the impact with Robert D. McClellan's vehicle, and in finding that no genuine issue of material fact existed on the issue of causation of Lora Lopez's injuries.

For the reasons stated herein, Appellant Lora Lopez respectfully requests this Court to reverse the decision of the Circuit Court.

Respectfully submitted, this the 18th day of June, 2009.

LORA LOPEZ, APPELLANT

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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 31(c), I hereby certify that I have delivered, via Unites States first class mail, the original and three (3) true and correct copies of the above and foregoing Appellant's Brief to Betty W. Sephton, Clerk, Mississippi Supreme Court, Post Office Box 249, Jackson, Mississippi 39205-0249.

I further certify that I have this date delivered, via Hand Delivery, a true and correct copy of the above and foregoing Appellant's Brief to the following:

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Honorable Jerry O. Terry
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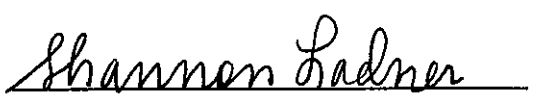
I further certify that, pursuant to M.R.A.P. Rule 28(m), I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written on Microsoft Word format.

SO CERTIFIED, this the 18th day of June, 2009.



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